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FIREMAN'S FUND vs. ONEBEACON INSURANCE

April 01, 2015

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Ibello

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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FIREMAN'S FUND INSURANCE COMPANY,

Plaintiff,

vs. Case No. 14 CV 4718

ONEBEACON INSURANCE COMPANY as
successor-in-interest to
GENERAL ACCIDENT INSURANCE
COMPANY OF AMERICA,

Defendant.

-----x

GARY IBELLO

New York, New York

Wednesday, April 1, 2015

Reported by: Steven Neil Cohen, RPR

Job No. 309212

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1 Ibello

2 A. Yes.

3 Q. I am not going to ask you to guess
4 but I am asking you to use your best
5 knowledge when you answer questions and your
6 best memory.

7 I understand and we will talk
8 about it in a minute that you are here not
9 only in your individual capacity with
10 respect to your work on these claims or this
11 claim, rather, but also as a Rule 30(b)(6)
12 witness.

13 Are you aware of that?

14 A. Yes.

15 Q. Have you seen the notice of
16 deposition relating to that notice?

17 A. Yes.

18 Q. Could you tell us what you did to
19 prepare for the deposition today?

20 A. I reviewed documents, had a
21 telephone conference and a meeting with
22 Fireman's Fund's counsel in this matter.

23 Q. And that is Mr. Schwartz?

24 A. Yes.

25 Q. Okay. Was there anybody else



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2 evaluating the claim and securing management
3 approval for various reserve
4 recommendations.

5 Q. Who was the claim team?

6 A. Dan Kane, Eric Billeter were the
7 primary ones and we worked with an internal
8 actuary by the name of Madelyn Faggella.

9 Q. What was Ms. Faggella's role?

10 A. She is an actuary, reserving
11 actuary at Fireman's Fund.

12 Q. And exactly what did you do in
13 that capacity with respect to this claim?

14 A. Basically over the life of the
15 claim as they were -- would make
16 recommendations on the -- reserving the
17 claim I would work with them on reviewing
18 that recommendation and when necessary
19 presenting that to senior management for
20 approval.

21 Q. Did you have any input into how
22 the claim was modeled for purposes of
23 exposure to Fireman's Fund?

24 A. I would have been involved in some
25 of the discussions around the modeling, yes.

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2 Q. Who does the allocation? That is
3 my question.

4 A. Generally it would be -- it could
5 be the underlying insurance carriers, it
6 could be the insured.

7 Q. Is the concept of exhaustion a
8 general insurance concept or is it a
9 contractual one that you find in your
10 policies?

11 A. I would say it is both.

12 Q. Okay. With respect to the
13 Fireman's Fund policies are you aware that
14 there are exhaustion provisions, when I say
15 the "policies" I mean the three policies
16 that were involved in the ASARCO litigation.

17 Do you understand what we are
18 talking about?

19 A. Yes.

20 Q. Are there contractual provisions
21 in those policies that relate to exhaustion?

22 A. Yes.

23 Q. Without looking at the policy do
24 you know what those provisions are, what
25 they are captioned or called?

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2 A. I prefer to see the wording but --

3 Q. What is your general understanding
4 of where those provisions are found?

5 A. Generally -- well, it is in the --
6 generally in the -- up front in the insuring
7 agreement and then there is usually a
8 schedule of underlying insurance.

9 Q. Turn to the next page please. Let
10 me strike that.

11 Let's go back to the prior page.

12 Under C, your liability
13 evaluation, it states, "The XLX blanket
14 excess liability policies at issue on Form
15 5902-2-72 all provide that the company will
16 indemnify the insured for the insured's
17 ultimate net loss in excess of the
18 underlying of the insurance underlying the
19 XLX policies."

20 Do you see that?

21 A. Yes.

22 Q. That is what you are referring to
23 there being underlying limits, correct?

24 A. Yes.

25 Q. So would it be fair to say that

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2 the Fireman's Fund policies don't attach
3 until there is exhaustion of those
4 underlying limits?

5 A. Yes.

6 Q. Looking down to the next full
7 paragraph it states, "The insurance afforded
8 by the policies is subject to the same
9 warranties, terms, conditions and exclusions
10 as are contained in the underlying insurance
11 except unless otherwise specifically
12 afforded in the XLX policies any premium the
13 obligation to investigate and defend the
14 amounts and limits of liability in any
15 renewal agreement."

16 Do you understand what that means?

17 MR. SCHWARTZ: Just one
18 clarification. You said "afforded"
19 instead of "provided." That is not a
20 big deal.

21 MR. KING: Okay. Please can you
22 make that correction, "afforded" as
23 opposed to "provided"?

24 MR. SCHWARTZ: No. "Provided."
25

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2 First of all, do you know who
3 established that reserve of \$1 million to
4 each policy?

5 A. Well, when you say "established,"
6 the claims handler, in this case, Dan, would
7 have recommended that reserve to his
8 manager, Mr. Billeter and at this time I
9 can't recall if that was within
10 Mr. Billeter's authority then he probably
11 would have posted it. If not then they
12 would have sent it to me for approval.

13 Q. In that next paragraph or the next
14 sentence down that I read where it says, "To
15 date ASARCO has not submitted sufficient
16 information to establish exhaustion," do you
17 understand what Mr. Kane means by that?

18 A. Yes.

19 Q. What does he mean?

20 A. It means that ASARCO had not
21 submitted sufficient information to us for
22 us to establish exhaustion.

23 Q. What would have established
24 exhaustion to Fireman's Fund?

25 A. Information on their claims

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2 history showing that they had sufficient
3 claims that were allocated to these policy
4 years on a basis that we agreed with that
5 exhausted the amount of the underlying
6 limits.

7 Q. What do you mean by "that we
8 agreed with"?

9 A. Well, there were a lot of disputes
10 already at this stage of the claim regarding
11 primarily the asbestosis exclusion, whether
12 or not the policies paid defense costs.

13 Q. Just going back to the defense
14 costs issue what was the basis of the
15 dispute regarding whether or not the
16 policies paid defense costs?

17 A. Whether or not they paid defense
18 costs.

19 Q. On what basis was there a dispute?
20 Was there a provision in the policy relating
21 to defense costs?

22 A. Yes. There is a provision in the
23 policy regarding expenses.

24 Q. Was there a dispute between
25 Fireman's Fund and ASARCO regarding the

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2 Q. Did you see any evaluation of or
3 assessment of whether your policies require
4 the actual payment of limits under the
5 policies in order to have underlying
6 exhaustion?

7 A. I am familiar with our policy
8 language and it requires exhaustion.

9 Q. And when you used the term
10 "exhaustion" in that context tell me exactly
11 what you mean by it.

12 A. That claims appropriately
13 allocated to that policy period have been
14 resolved that equal the amount of the stated
15 underlying insurance.

16 MR. SCHWARTZ: When you reach an
17 appropriate place we can take a break,
18 whenever you want.

19 MR. KING: Sure. We can take a
20 break right now.

21 (Recess)

22 MR. KING: Mark this as Exhibit
23 7.

24 (Memo dated 6/18/2004 was marked
25 Defendant's Exhibit 7 for identification)

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2 (Cover note for the period March
3 15, 1983 to March 15, 1984 was marked
4 Defendant's Exhibit 18 for identification)
5 MR. KING: Exhibit 19.
6 (Two pages of a General Accident
7 Insurance Company of America facultative
8 participation on a Fireman's Fund policy of
9 insurance. was marked Defendant's Exhibit 19
10 for identification)

11 BY MR. KING:

12 Q. Mr. Ibello, back on the record.
13 Exhibit 11 is a document from
14 Lawrence Levy of Rivkin Radler. They were
15 the trial counsel for Fireman's Fund and
16 ASARCO, right?

17 A. Yes.

18 Q. And this is excerpts from an index
19 of documents, policies that were provided by
20 Mr. Levy to Cliff Handler, do you see that,
21 the cover letter?

22 A. Yes.

23 Q. Have you seen this before?

24 A. I don't recall this document, no.

25 Q. Let me ask you to look at the

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2 third page which is FFIC 290.

3 A. Okay.

4 Q. Do you have an understanding as to
5 whether that is an accurate -- this is --
6 strike that.

7 This is an index of a policy
8 period 3/15/82 through 3/15/83.

9 Do you have an understanding as to
10 whether that is an accurate listing of those
11 policies and their limits?

12 A. I have no reason to believe
13 otherwise.

14 Q. Turn to the next page, same
15 question. This is for the period 3/15/83 to
16 3/15/84.

17 A. Same. Have no reason to believe
18 otherwise.

19 Q. The next document is marked as
20 Exhibit 12 to your deposition. It is a
21 letter from Anderson Kill & Olick to David
22 Geronemus.

23 Mr. Geronemus was a mediator that
24 you used in the dispute with ASARCO,
25 correct?

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2 A. Yes.

3 Q. Were you involved in the mediation
4 proceedings with Mr. Geronemus?

5 A. No.

6 Q. Who attended on behalf of the
7 Fireman's Fund? Mr. Billeter?

8 A. I believe so, yes.

9 Q. Did you review reports that came
10 from the Crowell firm regarding those
11 mediations?

12 A. I believe I would have reviewed
13 some. Yes.

14 Q. Did you review any of the
15 mediation briefs that were submitted in the
16 course of the mediation process?

17 MR. SCHWARTZ: Are you talking
18 about at the time or in preparation
19 for the deposition?

20 MR. KING: That is a good
21 question.

22 BY MR. KING:

23 Q. Contemporaneously did you as the
24 mediation proceedings were going on did you
25 review the briefing?

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2 A. I don't recall specifically.

3 Q. Have you subsequently reviewed the
4 mediation briefs and papers?

5 A. I have seen some of them, yes.

6 Q. Let me just ask you to turn to the
7 last page of this particular exhibit.

8 This is a document that was an
9 exhibit to a submission by Anderson Kill who
10 was representing ASARCO in that case,
11 correct?

12 A. Yes.

13 Q. This was Exhibit D to one of your
14 mediation briefs. It is a chart showing the
15 insurance towers provided to ASARCO.

16 Do you see that?

17 A. Yes.

18 Q. Do you have any -- do you believe
19 this to be an accurate chart of the coverage
20 afforded to ASARCO for the years 1968
21 through 1984?

22 A. I don't have any independent
23 knowledge of the accuracy.

24 Q. But with respect to the last two
25 years, the 1983 and 1984 years, do you

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2 believe those to be accurate?

3 A. They appear to be, yes.

4 Q. So if we look at the chart with
5 respect to the 1982 to 1983 policy we will
6 see that Fireman's Fund sits on top of that
7 particular tower and it spans from
8 \$33 million to \$53 million, right?

9 A. Yes.

10 Q. So the underlying limits in that
11 year are \$33 million comprised of the
12 underlying insurance policies plus the
13 \$3 million self-insured retention held by
14 ASARCO, correct?

15 A. I believe that is correct, yes.

16 Q. For the second year -- I am sorry,
17 for the 1983 to 1984 year you will see that
18 there are two Fireman's Fund policies.

19 The first one is, spans from
20 \$33 million to \$53 million and that is the
21 \$20 million excess \$30 million policy,
22 correct?

23 A. Yes.

24 Q. It also sits above the \$3 million
25 so a total of \$33 million underlying?

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A. Do you want to add up the --

Q. If I represent to you that it is
\$33 million will you accept that?

A. Sure.

Q. You can look if you like.

A. Okay.

Q. So there is \$33 million underlying
that, correct?

A. Yes.

Q. All right.

And then if you go up, just above
the first Fireman's Fund policy is a Twin
City fire policy for \$15 million, correct?

A. Yes.

Q. As depicted there and then a
Prudential policy of \$10 million there,
correct?

A. Yes.

Q. And then sitting on top of that is
Fireman's Fund's \$20 million excess of
\$75 million policy, correct?

A. Yes.

Q. And plus another \$3 million
self-insured retention.

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So that policy sits excess of
\$78 million in underlying coverage, correct?

A. Yes.

Q. And can we agree that that policy
there, that one that is 75 excess of
\$20 million which is the policy that gives
rise to the claim in this lawsuit that we
are here for?

A. Yes.

Q. So this is a depiction at least
for those last two years of what I referred
to as the coverage towers covering ASARCO in
those two years, correct?

A. Yes.

Q. Do you have any reason to believe
that the rest of the towers as shown there
are inaccurate?

A. No. Although I would point out
there is one limit there that seems to be
scratched out and a handwritten number
written in there. I don't know what that
references.

Q. Where are you looking there?

A. It is in the '78-'79 year.

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2 Q. Okay. Exhibits 13, 14 and 15 are
3 respectively the 1982 to 1983 Fireman's Fund
4 policy which is 30 million excess of
5 \$20 million.

6 The 1983-1984 policy which is --

7 MR. SCHWARTZ: You said it
8 backwards.

9 BY MR. KING:

10 Q. Let me restate that.
11 Exhibit 13 is the 1982 to 1983
12 policy, if I am correct.

13 MR. SCHWARTZ: Off the record.
14 (Discussion off the record)

15 BY MR. KING:

16 Q. Let's redo it.

17 MR. KING: Thank you, Steve.

18 BY MR. KING:

19 Q. Exhibit 13 is the Fireman's Fund
20 1982 to 1983 policy which provides limits of
21 \$20 million excess of \$30 million, correct?

22 A. Yes.

23 Q. Exhibit 14 is Fireman's Fund's
24 policy which provides limits of \$20 million
25 excess of \$30 million for the period 1983 to

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2 1984; is that correct?

3 A. Yes.

4 Q. And then Exhibit 15 is Fireman's
5 Fund's policy which was in effect for the
6 period 1983 to 1984 which provides coverage
7 of \$20 million excess of \$75 million,
8 correct?

9 A. Yes.

10 Q. Now, other than the limits of
11 liability, underlying insurance limits of
12 liability the premium basis and the schedule
13 of underlying insurance that shows up on the
14 first page of these policies.

15 Do you see that?

16 A. Yes.

17 Q. Do you have an understanding as to
18 whether or not they provide -- each one of
19 them is written on the same form?

20 A. Yes, I believe they are all three
21 written on the same 5902-2-72 form.

22 Q. And in addition to being written
23 on that form it is correct to say that each
24 one of them has identical endorsements 1
25 through 3, is that right?

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2 A. Yes. I believe that is correct.

3 Q. So to the extent I asked you
4 questions as we proceed in the next few
5 minutes about the insuring agreements under
6 these policies I presume that the answers
7 will be the same with respect to the terms
8 and conditions, is that fair?

9 A. Well, generally, yes.

10 Q. Let me ask you in the first
11 instance to go to Exhibit 13 which is that
12 first policy which is the 1982 to 1983
13 policy which provides the 20 million excess
14 of \$30 million.

15 Do you see there that there is a
16 premium, annual minimum premium of \$60,000?

17 A. Yes.

18 Q. That is the premium that was paid
19 to Fireman's Fund for that policy, correct?

20 A. I believe so, yes.

21 Q. Okay. And then if we go down to
22 item 7 which is the schedule of underlying
23 insurance that lists the underlying policies
24 for this particular policy that would have
25 to be exhausted prior to this policy having

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1 Ibello
2 any liability, correct or indemnity
3 obligation?

4 A. Yes.

5 Q. And if we look at Exhibit 14, that
6 is the same policy for the following year at
7 the \$20 million excess \$30 million level,
8 correct?

9 A. Yes.

10 Q. Okay. And here too you will see
11 there is a premium of \$60,000, correct?

12 A. Yes.

13 Q. And then we will see the schedule
14 of underlying insurance which is the same
15 three policies, is that right?

16 A. Yes. It is the same three
17 insurance companies' limits. I don't know
18 about the specific policies.

19 Q. Fair comment.

20 So the same companies and same
21 underlying limits in each of those two
22 policies, correct?

23 A. Yes.

24 Q. If we look at Exhibit 15 which is
25 the higher level policy for the 1983 to 1984

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1 Ibello
2 year that one is \$20 million excess of
3 \$75 million, correct?

4 A. Yes.

5 Q. And it states there the premium is
6 \$30,000, correct?

7 A. Yes.

8 Q. Do you have an understanding as to
9 why the premium for this higher level policy
10 at Exhibit 15 is less than and in fact half
11 of the policy premium for the Exhibits 14
12 and 13?

13 A. I don't have any specific
14 knowledge but just in general it attaches at
15 a higher point so they probably charge less
16 premium.

17 Q. By that you mean that there is
18 a -- it is further from liability by virtue
19 of there being more underlying limits?

20 A. The underlying limits of liability
21 are greater in this policy than the other
22 two.

23 Q. Would you agree with me that it is
24 about -- that last policy, Exhibit 15 is
25 more remote from the risk by virtue of

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1 Ibello
2 having further underlying or greater
3 underlying limits?

4 MR. SCHWARTZ: Objection to
5 form.

6 THE WITNESS: I am not sure
7 about the risk part but it attaches at
8 a higher level. It attaches at a
9 higher level.

10 BY MR. KING:

11 Q. Why would an underwriter take
12 \$30,000 for one -- for the policy attaching
13 excess of \$75 million versus \$60 million for
14 the policy attaching excess of \$30 million?

15 MR. SCHWARTZ: Objection to
16 form.

17 THE WITNESS: As I stated
18 earlier I am not an underwriter but my
19 general understanding is since it
20 attaches at a higher level the premium
21 charge for that is less.

22 BY MR. KING:

23 Q. And why? But why?

24 A. Because it attaches at a higher
25 level.



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2 Q. What does that mean?

3 A. That you have to have 75 million
4 in losses before the policy is triggered
5 versus 30 million.

6 Q. In this case it is actually more
7 like \$78 million because of the
8 self-reinsured retention; correct?

9 A. 78 versus 33, yes.

10 Q. I am going to direct you to --
11 let's use Exhibit 15 but we have agreed that
12 the insuring agreements are identical in all
13 of these, correct?

14 A. Yes.

15 Q. So if I ask a question about 15
16 relating to the terms and conditions it will
17 be the same answers for Exhibit 14 and 13,
18 correct?

19 A. Yes. But could I suggest you use
20 the first one because it is a much clearer
21 copy.

22 Q. Okay. That is fair enough. I
23 will do that.

24 Let me ask you, before I go on to
25 that with respect to Exhibit 15 which is the

JEFFREY ARNOLD SVETSKA
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1 Svetska

2 claims report in your reference.

3 Q. Well, let me ask you another
4 question. Where would this information have
5 come from?

6 A. This information would have come
7 from the claim file.

8 Q. So you would have just been
9 adopting what you found in the claim file
10 and reporting what you found in the claim
11 file?

12 A. The main source of information for
13 this particular report that I wrote appears
14 to be the March 26, 2012 closing file report
15 asbestos DRA.

16 Q. What is that?

17 A. That would be a claims department
18 narrative report.

19 Q. Okay. And you would have relied
20 upon that document for purposes of preparing
21 this report, correct?

22 A. In part, yes.

23 Q. What else -- what did you generate
24 specifically on this report that wasn't from
25 the claims department information in the

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2 Q. Let me see if I have that for you.

3 A. The schedule shows American Home.

4 Q. Let me ask you to just quickly
5 look at Exhibit 16.

6 Does that appear to be the
7 underlying policy to which this follows
8 form?

9 A. It appears to be, yes.

10 Q. Now, there is an exception --
11 going back to the clause we just looked at
12 there is an exception to the following form
13 with respect to "warranties, terms,
14 conditions or exclusions relating to
15 premium, the obligation to investigate and
16 defend the amount and limits of liability in
17 any renewal agreement."

18 Do you see that?

19 A. Yes.

20 Q. So that means if I am correct that
21 there are separate terms and conditions of
22 this policy that stand alone and separate
23 from the underlying policies, correct?

24 A. Yes.

25 Q. Now, we have talked this morning

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2 quite a bit about exhaustion. You said that
3 there were contractual provisions for
4 exhaustion, correct?

5 A. Yes.

6 Q. Do different policies contain
7 different provisions for providing for
8 exhaustion?

9 A. Yes.

10 Q. The language varies, correct,
11 across the industry?

12 A. Yes.

13 Q. Can you show me what the
14 provisions within this policy are that
15 identify the exhaustion requirements under
16 the policy?

17 A. This is one of those that wasn't
18 stapled.

19 Q. We have a stapler here.

20 A. Okay. The limits of liability
21 section, I think this basically addresses
22 the underlying insurance issues.

23 Q. Is this something that you viewed
24 in connection with your preparing for the
25 deposition today?

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2 A. I reviewed the policy, yes.

3 Q. Did you specifically review the
4 limits of liability provision?

5 A. I believe so, yes.

6 In this particular policy there is
7 actually an endorsement that replaces this
8 language so the limits of liability is in a
9 separate endorsement.

10 Q. Right. That was my next question.

11 So we see that -- if you go back
12 to and we are looking at Exhibit 14,
13 correct, we are all looking at the same
14 document?

15 A. Yes.

16 Q. Under insuring agreements item
17 number 2 there is a provision that refers to
18 limit of liability, correct?

19 A. Yes.

20 Q. And if you turn to endorsement
21 number 1 you will see there is an
22 endorsement that is -- specifically changes
23 the limit of liability provision or at least
24 addresses the limit of liability provision,
25 correct?



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2 A. Yes.

3 Q. That is the same provision in each
4 of the three policies we are talking about
5 here today, correct?

6 A. I would have to go back and look.

7 Q. Why don't you do that.

8 A. Yes.

9 Q. It starts off, "Under limit of
10 liability. The company shall be liable only
11 for the limit of liability stated in item 3
12 of the declarations in excess of the limit
13 or limits of liability of the applicable
14 underlying insurance policy or policies all
15 as stated in the declarations of this
16 policy." Right.

17 Do you see that?

18 A. Yes.

19 Q. That is referring back to the
20 block on the front page of the policy
21 showing in this case the \$20 million limits,
22 correct?

23 A. Yes.

24 Q. And it states, specifically that
25 it has to be excess -- that limit of



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2 liability only applies if it is excess of
3 the limit or limits of liability of the
4 underlying insurance policies, right?

5 A. Correct.

6 Q. Those are the policies that we
7 find either specifically listed or
8 referenced in item C of that front page,
9 correct, I am sorry, item 7?

10 A. Yes.

11 Q. The clause regarding limit of
12 liability goes on to state, "The limit of
13 the liability stated in the declarations as
14 applicable to each occurrence shall be the
15 total limit of the company's liability for
16 all damages sustained as the result of any
17 one occurrence provided however in the event
18 of reduction or exhaustion of the applicable
19 aggregate limit or limits of liability under
20 said underlying policy or policies solely by
21 reason of losses paid thereunder on a count
22 of occurrences during this policy. This
23 policy shall in the event of reduction apply
24 as excess of the reduced limit of liability
25 thereunder."

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2 What does that mean?

3 A. That basically means in a
4 situation where you have claims that are
5 subject to aggregate limits, that this
6 policy attaches once the -- that aggregate
7 limit has been exhausted by claims that are
8 subject to the aggregate.

9 Q. Do the policies underlying the
10 three policies we are talking about here all
11 have aggregate limits?

12 A. I haven't reviewed them but I
13 would assume that they had aggregate limits,
14 yes.

15 Q. So this policy doesn't attach
16 until there is payment of those aggregate
17 limits, correct?

18 MR. SCHWARTZ: Objection to
19 form.

20 THE WITNESS: Well, payment of
21 losses.

22 BY MR. KING:

23 Q. Losses paid thereunder.

24 Now let me ask you about some
25 specific words here.

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2 It says, "In the event of
3 reduction or exhaustion of the applicable
4 aggregate limit or limits of liability under
5 said underlying policy or policies solely by
6 reason of losses paid thereunder."

7 Do you see that phrase? "Solely
8 by reason of losses paid thereunder."

9 A. Yes.

10 Q. What does that phrase mean?

11 MR. SCHWARTZ: You might want to
12 read the whole phrase.

13 THE WITNESS: Well, it says that
14 the -- if the aggregate limit is
15 reduced by payment of losses that are
16 attributable to occurrences during
17 this policy period then this policy
18 will apply excess of reduced limit
19 based on the amount of the aggregate
20 limit that has -- under which losses
21 have been paid.

22 BY MR. KING:

23 Q. We agree that has to be exhaustion
24 of the underlying policies, right,
25 Mr. Ibello?



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2 A. Yes.

3 Q. Here is my question. Doesn't the
4 term "solely" -- strike that.

5 Doesn't the phrase "solely by
6 reason of losses paid thereunder" mean
7 losses actually paid by the underlying
8 insurers under their policies?

9 MR. SCHWARTZ: Objection.

10 Argumentative and also you are not
11 reading the whole phrasing, I don't
12 think.

13 THE WITNESS: It doesn't say
14 that, no.

15 BY MR. KING:

16 Q. What does the term "solely by
17 reasons of losses paid thereunder" mean?

18 MR. SCHWARTZ: Same objection.

19 THE WITNESS: It means that the
20 aggregate limit is reduced or the --
21 that -- I would call it the attachment
22 point for aggregate claims is reduced
23 under this policy by the payment of
24 claims resulting from occurrences that
25 trigger this policy period.

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2 BY MR. KING:

3 Q. There is no requirement -- strike
4 that.

5 What does the word -- what does
6 the term "thereunder" refer to in this
7 phrase?

8 A. I would say it refers to losses
9 paid under the aggregate limit.

10 Q. Does it not refer back to the
11 policies, the underlying policies, sir?

12 A. No, I don't believe so.

13 Q. In the -- let me read it again,
14 "In the event of reduction or exhaustion of
15 the applicable aggregate limit or limits of
16 liability under said underlying policy or
17 policies solely by reason of losses paid
18 thereunder," your position is that that term
19 "thereunder" does not refer back to payment
20 under the underlying policies, is that
21 right?

22 MR. SCHWARTZ: Asked and
23 answered.

24 THE WITNESS: I say it says
25 "losses paid." It does not



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2 specifically say who had to pay them.

3 BY MR. KING:

4 Q. What does "thereunder" mean then,
5 does it have a meaning?

6 A. I am interpreting "thereunder" to
7 be referring back to losses that are paid
8 that apply to the aggregate limit.

9 Q. On what basis is that your
10 interpretation?

11 A. The construction of the sentence.

12 Q. Okay. Do you know if at the point
13 in time when this claim was under review for
14 purposes of coverage to ASARCO whether
15 anybody analyzed the meaning of this
16 particular clause?

17 A. I don't know specifically but --

18 Q. Have you ever seen any analysis of
19 that clause in the underlying file?

20 A. Not that I recall.

21 Q. Do you have a sense -- strike
22 that.

23 Do you have an understanding as to
24 what law you believe would govern the
25 interpretation of that clause in the ASARCO

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2 matter?

3 A. There was a debate between Texas
4 and New York law applying.

5 Q. Was there a holding in a case with
6 respect to applicable law?

7 A. The judge ruled that Texas law
8 should apply.

9 Q. So that was the law of the case as
10 of the time of the resolution of the matter,
11 correct?

12 A. "Law of the case," I am not sure
13 what you mean by that but that was the
14 ruling by the judge that would have been
15 subject to appeal.

16 Q. What was -- you said there was a
17 debate. What law did Fireman's Fund
18 maintain applied to the policies?

19 A. New York.

20 Q. Do you know if anybody has ever
21 analyzed the meaning of that phrase on
22 behalf of Fireman's Fund under New York law?

23 A. I don't have a specific
24 recollection.

25 Q. You are the designee on the part

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2 of the company with respect to the terms and
3 conditions of this policy, right?

4 A. That's right.

5 Q. But you have no knowledge of that?

6 MR. SCHWARTZ: Well, objection
7 to form.

8 THE WITNESS: I have no
9 knowledge of a specific written
10 opinion from a specific counsel on
11 this language. I can --

12 BY MR. KING:

13 Q. Have you ever seen any opinions
14 within Fireman's Fund relating to the
15 interpretation of that clause, legal
16 opinions?

17 MR. SCHWARTZ: Is your question
18 directed generally or --

19 MR. KING: Generally.

20 MR. SCHWARTZ: So on any case,
21 not limited to ASARCO?

22 MR. KING: Right.

23 THE WITNESS: Yes, I believe we
24 have had this language interpreted in
25 handling claims under this policy

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2 Q. Okay. Do you believe this is
3 unambiguous?

4 A. Yes.

5 Q. You believe it is unambiguous in
6 saying -- in the interpretation you
7 afforded, correct?

8 A. Yes.

9 Q. Okay. Let me ask you this
10 question. We talked earlier about one of
11 your affirmative defenses that was pled in
12 the underlying case and that was with
13 respect to drop down. Do you remember that?

14 A. Yes.

15 Q. Where do you find the drop down
16 provisions in this particular policy?

17 A. I would say it is in the
18 maintenance of underlying insurance.

19 Q. How about the limit of liability
20 provision, does that affect the drop down
21 obligation or lack thereof?

22 A. I think they are separate
23 provisions.

24 Q. Show me in the policy where the --
25 where you gain an understanding of what the

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2 Fireman's Fund's obligations are to drop
3 down or not in the case of bankruptcy.

4 MR. SCHWARTZ: Do you want to
5 staple this? It may be easier.

6 THE WITNESS: Yes. Keep this
7 together.

8 I do not see a provision in this
9 policy that makes specific reference
10 to the insured being bankrupt.

11 BY MR. KING:

12 Q. So when you said earlier that you
13 would look to the policy to determine your
14 drop down obligations or lack thereof under
15 the Fireman's Fund policy where would you
16 look?

17 A. The limit of liability section.

18 Q. So the drop down obligations --
19 strike that.

20 You stated earlier that or it was
21 pled that there was no drop down obligation
22 under the Fireman's Fund policy, correct?

23 A. Yes.

24 Q. Where do you find that in the
25 limit of liability provision?



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A. It is in the language that basically says that policies excess of a certain limit and until there are losses that have been paid and attributable to that policy year that reach that limit we don't have to pay, whether that is because of the insurer going insolvent, the carrier going insolvent as long as -- our position is as long as there is loss that has been paid attributable to that year sufficient to exhaust the limit then this policy can be triggered.

Q. Now, are you aware of Fireman's Fund ever relying upon the language of solely by reason of losses paid thereunder to establish that it did not have a drop down obligation in bankruptcy by virtue of the fact there has to be actual payment under a policy?

MR. SCHWARTZ: Objection to form.

THE WITNESS: I am not sure under this language.

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2 BY MR. KING:

3 Q. Are you aware that type of
4 argument being made under other limit of
5 liability provisions?

6 MR. SCHWARTZ: Objection to
7 form.

8 BY MR. KING:

9 Q. Fireman's Fund limits of liability
10 provisions?

11 A. I can't say specifically Fireman's
12 Fund.

13 I am aware of cases that have made
14 that argument based on language that was
15 different than these policies.

16 Q. Have you reviewed those cases in
17 connection with your preparation for this
18 deposition?

19 A. No.

20 Q. Do you know if anybody has
21 analyzed the limits of liability provision
22 in connection with the reinsurance claim
23 against OneBeacon in this case?

24 A. No.

25 Q. You don't know or it has not been

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done other than advice from counsel?

A. I don't know.

Q. Did you ever speak to Mr. Svetska about handling the reinsurance claim?

A. In what context?

Q. In the context of the denial by OneBeacon.

A. I have had general discussions but nothing specific.

Q. Have you ever discussed the limit of liability provision with Mr. Svetska in connection with OneBeacon's denial of the claim?

A. No.

Q. Have you ever discussed the limit of liability provision with anyone else at Fireman's Fund other than counsel in connection with OneBeacon's denial of the claim?

A. No.

Q. One more set of questions and then we will break for lunch. Then I will get some more documents.

A. Those are all for Mr. Svetska.

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2 on 9/17/08 was marked Defendant's Exhibit
3 28 for identification)

4 BY MR. KING:

5 Q. Exhibit 28, Mr. Ibello, is a
6 9/17/08 update on asbestos presumably
7 prepared by Mr. Kane at this point in time;
8 is that right?

9 A. Yes. I believe so.

10 Q. At this point it is showing
11 reserves spread through three different
12 policy periods, correct?

13 A. That is correct, yes.

14 Q. Who made the determination to
15 allocate to the three different policies?

16 A. Well, basically in this case where
17 we are evaluating sort of the ground up
18 exposure and you are in a bankruptcy context
19 so instead of just negotiating coverage in
20 place we handle claims as they come in you
21 are including future, an estimate of future
22 claims, number one.

23 And then number two, you have
24 various coverage arguments that were being
25 litigated so we use this type of modeling in

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2 these cases to estimate our liability like
3 we talked about in the prior exhibit and
4 the --

5 Q. Sorry. Go ahead.

6 A. And so part of that modeling as we
7 saw it showed that an average or an exposure
8 of \$21 million and that \$21 million is an
9 average of different scenarios a number of
10 which expose all three policies so our
11 practice is to reserve the policies
12 consistent with how the exposure is
13 developed in our modeling.

14 Q. When you say your "practice," you
15 mean Fireman's Fund's practice generally?

16 A. Yes.

17 Q. That is the -- is that the process
18 it always uses in terms of setting reserves?

19 A. For this type of case I would say,
20 yes.

21 Q. Let me ask you this. When you
22 used the term "reserves," explain to me what
23 that means and what reserves are.

24 A. Well, reserves are basically your
25 estimation of what you will ultimately pay

